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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS E. MAROTTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner was denied his Sixth Amendment right to counsel?
2. Did the irreconcilable conflict of interest between Petitioner and his ostensible attorney deprive Petitioner of his right to counsel?

LIST OF PARTIES

The United States of America

Appellee

v.

Donald J. Paone, Anthony M. Columbo, Joseph R. Rossi, a/k/a "The Hop," Thomas E. Marotta, Richard J. Marino, Rene Piccaretto, Samuel J. Russotti, a/k/a "Red"

Appellants

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 782 F.2d 386 and is reprinted in the Appendix, infra, at page A-1 et seq.

JURISDICTION

The Petitioner was charged together with nine co-defendants in a two count indictment filed on November 8, 1982 in the Western District of New York.

Trial began on September 17, 1984 and the verdict was returned on October 30, 1984. Three co-defendants were acquitted. Petitioner and six others were convicted. Petitioner has been incarcerated since the verdict.

On February 5, 1986 the United States Court of Appeals for the Second Circuit affirmed the convictions of all appellants. The Second Circuit opinion is reprinted in the Appendix, infra, at page A-1. The Petitioner's application for re-hearing en banc was denied on March 19, 1986. That order is reprinted in the Appendix, infra, at page A-20.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI, which states that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

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OCTOBER TERM, 1986

THOMAS E. MAROTTA,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The Petitioner was accused in both counts of a two count indictment. Count one alleged a substantive violation of the Racketeer Influenced and Corrupt Organizations ("R.I.C.O.") Act. 18 U.S.C. §1962(c). Count two alleged a conspiracy to violate the R.I.C.O. statute. 18 U.S.C. §1962(d).

The Petitioner was found guilty on both counts at trial before the Honorable Thomas C. Platt and a jury. On December 17, 1984 the Petitioner was sentenced to two concurrent prison terms of twenty years.

The Petitioner was ostensibly represented by attorney Richard Miller throughout the pre-trial proceedings and into the trial itself. Mr. Miller had never informed Petitioner that he had previ-

ously represented Angelo Monachino, a key prosecution witness. Had Petitioner been so advised he would not have engaged Mr. Miller. *Vol. 4 P.M., p. 1109.

MONACHINO

Angelo Monachino began his testimony on the morning of Thursday, September 20, 1984. Vol. 4 A.M., p. 895. Monachino had entered the witness relocation program in July, 1975. Vol. 4 A.M., p. 984; Vol. 4 P.M., p. 1190. From that time until sometime in 1978, Monachino was paid by the federal government. Vol. 4 P.M., pp. 1180-1182. Monachino was still in the relocation program when he testified in this case. Vol. 4 A.M., pp. 892-893.

The evening before his testimony, Monachino told prosecution trial counsel that Mr. Miller was present while his immunity arrangements were being made. Vol. 4 A.M., pp. 1004-1006, 1009-1010. The prosecution did not disclose this information to the court prior to Monachino's testimony.

On his direct examination, Monachino testified that he was inducted into an organization during February, 1971. Vol. 4 A.M., p. 913. He stated that the organization's purposes included gambling, extortion, theft, arson, loansharking and otherwise acquiring money in an illegal manner. Vol. 4 A.M., pp. 913, 920. Over defense objection, Monachino testified that the organization was referred to as the "mafia, the mob" and "the Cosa Nostra." Vol. 4 A.M., p. 914. He testified that a murder he was involved in had occurred at premises owned by the organization's leader. Vol. 4 A.M., p. 899.

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* Vol. references are to the transcript volumes in the record on appeal.

Monachino described his organization induction ceremony in detail. Vol. 4 A.M., pp. 918-920. Over defense objection, Monachino outlined how the organization's rules focused upon obtaining permission from one's "captain." Vol. 4 A.M., p. 923.

According to Monachino, the organization underwent a leadership change in June, 1972. He claimed that Mr. Marotta, who had allegedly joined the organization in 1971 or 1972, had purportedly become a captain. Vol. 4 A.M., pp. 926-928. Monachino contended that he was still an organization member in June, 1975 and that Mr. Marotta was a captain at that time. Vol. 4 A.M., pp. 983-984.

Counsel for Mr. Piccarreto was first to cross-examine Monachino. Vol. 4 A.M., p. 985. That examination initially focused upon the murder, arson and stolen property charges that were pending against Monachino at the time his deal was cut with the authorities. Vol. 4 A.M., pp. 985-993. Monachino testified that he surrendered to the authorities and was arraigned that day. Vol. 4 A.M., pp. 992-996.

Monachino was then cross-examined about his conversations that day with a sheriff's detective. Vol. 4 A.M., pp. 996-1000. When asked how the post-arraignment conversations occurred, Monachino volunteered:

> "[w]ell, Mr. Miller was not trying to chase bail, and we had bail pretty well set . . ."

The court immediately interjected itself by inquiring "[w]ho is Mr. Miller?" Monachino identified the "attorney" for Mr. Marotta. Vol. 4 A.M., p. 1000. Mr. Miller approached the bench and blurted out "I was his lawyer at the time. It happened on a Saturday." Vol. 4 A.M., pp. 1000-1001. At that point, the jury was excused and discussion was had between the court and counsel.

Initially, the prosecutor requested that Mr. Marotta and Mr Miller address the situation. The prosecutor represented that areas of "fruitful" cross-examination existed particularly with respect to Monachino's immunity agreement. Vol. 4 A.M., pp. 1004-1005. According to the prosecutor, "Mr. Miller was in a position of attorney client with" Monachino. Vol. 4 A.M., p. 1005. The prosecutor then stated that the previous evening, he had learned from Monachino that Mr. Miller was present while Monachino's immunity arrangements were being made. Vol. 4 A.M., p. 1010. Later, the prosecutor tried to retract his earlier representation that Mr. Miller acted as Monachino's attorney in connection with the immunity agreements. Vol. 4 A.M., pp. 1010-1011.

During the discussion, counsel for Mr. Marino expressly mentioned the prosecution's duty, under "Rule 44," to alert the court as to any potential conflict problem. Vol. 4 A.M., p. 1010; Rule 44, Fed. R. Cr. P. Equally as devastating was the prejudicial impact of Mr. Marotta's and Monachino's purported membership in an alleged organization together with the jury's knowledge about Mr. Miller's representation of both men. This catastrophic result was immediately perceived by court and counsel. Vol. 4 A.M., pp. 1010, 1013-1014.

Incredibly, the court faulted defense counsel for not disclosing the prior representation and completely excused the prosecution from any blame whatsoever. Vol. 4 A.M., p. 1014. Significantly, all but one of the other defense counsel disclaimed any knowledge of the prior representation. Vol. 4 A.M., pp. 1006-1014, 1016-1018. The other defense attorney indicated that it was his impression that the Miller-Monachino relationship had consisted of one court appearance. Vol. 4 A.M., p. 1007. During subsequent discussion, it was disclosed that Mr. Miller had represented Monachino at a preliminary hearing on the murder charge. Vol. 4 A.M., p. 1027.

At the conclusion of the initial conference with counsel, the court instructed Mr. Miller to discuss the situation with Mr. Marotta. The court also directed the prosecution to confer with Monachino to determine whether he had any objection to Mr. Miller's making a "full exposition" of his discussions with Monachino. Vol. 4 A.M., p. 1016.

When counsel returned, Mr. Miller immediately advised that he had been discharged by Mr. Marotta. The prosecutor announced that Monachino had waived his attorney/client privilege with Mr. Miller. Vol. 4 A.M., p. 1018. Initially, the court perceived the issue as being whether Mr. Marotta knew of the prior representation. Vol. 4 A.M., pp. 1018-1019. Ultimately, the court determined that if Monachino waived the privilege, he was free to compel Mr. Miller's continued representation of Mr. Marotta. In the court's view, if Monachino waived the privilege, then Mr. Marotta had "no standing to complain." Vol. 4 A.M., pp. 1020-1021. Although expressly mentioned, the court summarily rejected any consideration of Mr. Marotta's right to conflict-free counsel. Vol. 4 A.M., p. 1024.

The court decided to examine Monachino on the waiver issue. Vol. 4 A.M., pp. 1027, 1032, 1038. The court indicated its willingness to appoint counsel to advise Monachino. id. Counsel for Mr. Rossi requested an instruction that the prosecution not speak to Monachino or attempt to advise him. Vol. 4 A.M., pp. 1037-1038. No such instruction was ever given.

EX PARTE EXAMINATION

The court then examined Monachino in the presence of the prosecution and in the absence of any defense representative. Vol. 4 A.M., pp. 1038-1052; Vol. 4 P.M., pp. 1102-1103. Monachino was not placed under oath nor advised that the previously administered oath was still in effect. Vol. 4 P.M., pp. 1082-1083.

Monachino asked what would occur if he refused to waive the privilege and whether the trial would continue without his waiver. Vol. 4 A.M., p. 1042. Without determining whether Monachino desired his own attorney, the court indicated that the trial might not continue absent a waiver from Monachino. id. Then the court advised Monachino that without his waiver:

> ". . . Mr. Marotta can say, 'I'm entitled to a mistrial and get a new attorney.' That's the problem. Do you see what I'm saying? What I'm saying is if you — if you waive, then Marotta can't take that position." Vol. 4 A.M., p. 1043.

The offer of independent counsel was reiterated. Vol. 4 A.M., pp. 1049. Monachino responded, "[w]hat if I talk to Rowe?" id. The court stated that Mr. Rowe had the prosecution's "interests at heart" adding that "I don't know that there is any separate interest." id. Monachino indicated that his interest and the prosecution's were identical. id. The court stated that Monachino could confer with prosecuting counsel. id. When Monachino again asked if his waiver would permit the proceedings to continue, the court responded that it would remove the "biggest stumbling block." Vol. 4 A.M., p. 1050. Then the court reiterated its view that Monachino's waiver would obliterate a claim of prejudice by Mr. Marotta. Vol. 4 A.M., pp. 1050-1051. Monachino was then permitted to confer with the prosecutor. Vol. 4 A.M., p. 1051. Upon returning, Monachino purported to waive both the privilege and the opportunity to confer with independent counsel. Vol. 4 A.M., pp. 1051-1052.

THE ULTIMATUM

After a recess, the court announced its decision. The court refused to relieve Mr. Miller. In the event that Mr. Marotta persisted in his decision to discharge Mr. Miller the court ruled that "he'll have to represent himself pro se." Vol. 4 P.M., p. 1071. The court stated that:

> "I'm not going to delay the trial to obtain new counsel for him given the facts as I know them." id.

There was further discussion with counsel as to the court's proposed jury instruction and the law applicable to conflict and right to counsel issues. At that time, the court was advised that Mr. Marotta wished to be heard. Vol. 4 P.M., pp. 1072-1075. The court stated that it would hear Mr. Marotta only if he demanded to be heard and only after receiving his *Miranda* warnings. Vol. 4 P.M., p. 1103.

After an address by the court, Mr. Marotta reiterated that he had discharged Mr. Miller. Vol. 4 P.M., pp. 1105-1107. The court then told Mr. Marotta that:

> "[y]ou do not have the right to discharge an attorney in the middle of a trial without my consent.
>
> "You can proceed pro se and have him do nothing, but that will not eliminate his duty to sit here during the course of the trial with you.
>
> The only way you can proceed further in this case is by representing yourself . . ." Vol. 4 P.M., p. 1108.

Mr. Marotta informed the court that he first learned of the Miller-Monachino relationship that very morning. He added that he would not have engaged Mr. Miller as his counsel had he known of the conflict. Vol. 4 P.M., p. 1109. The court responded:

> "I'm not passing on that one way or the other. I'm just telling you what the consequences are. I can't control how you proceed Mr. Marotta except to tell you the trial is going forward."

Mr. Miller stated that he would remain only because the court had ordered him to. The court expressly acknowledged that Mr. Miller's continued presence was over the objection of Mr.

Marotta. Vol. 4 P.M., p. 1110. Thereafter, the court summarily denied a defense request to discuss an alternate instruction to the jury asserting that "[w]e've taken long enough." Vol. 4 P.M., p. 1111. All defendants objected. id.

THE INSTRUCTION

The jury was then brought in and addressed by the court. Vol. 4 P.M., pp. 1114-1116. Initially, the jury was misinformed that counsel's questions, not the court's had triggered the interruption. id. Then the court indicated that it had attempted to ascertain the facts and expressly disclaimed any representation or suggestion that the matters he was about to disclose were true. Vol. 4 P.M., p. 1114. Monachino's cross-examination continued the rest of the day.

THE ULTIMATUM REVISITED

The trial continued on Friday, September 21, 1984. The court opined that the only alternative available to Mr. Marotta was to discharge Mr. Miller and to proceed *pro se*. Vol. 5 A.M., p. 1272. Again, the court stated that "[y]ou can't interrupt a trial and demand the right to obtain new counsel." id. The court stated that it would reserve decision on the "prejudicial impact" of Mr. Miller's presence at counsel table. id.

Over objection by defense counsel, the court allowed Mr. Miller to conduct a brief cross-examination of Monachino which merely rehashed the prior representation. Vol. 5 A.M., pp. 1276, 1374-1375. The Miller cross-examination was halted by the court who declared a recess so that defense counsel could speak to Miller. Vol. 5 A.M., pp. 1375-1377.

During the recess, Mr. Marotta reiterated to defense counsel that Mr. Miller was not his attorney. Mr. Marotta stated that Mr. Miller was not authorized to ask any questions and he expressed a

desire to find another attorney. Vol. 5 A.M., pp. 1383-1384. The court stated that Mr. Marotta had a right to proceed *pro se* and added that "I'm not going to grant a continuance for obtaining new counsel in this case." Vol. 5 A.M., p. 1384. Mr. Miller inquired whether the court would grant Mr. Marotta a severance. The court immediately stated that it would not grant a severance adding that:

> "I think the Ellenbogen case is clear that I should not. Certainly not an abuse of discretion by me." Vol. 5 A.M., p. 1385.

Mr. Marotta was summoned to the bench. Vol. 5 A.M., p. 1387. He was told that Mr. Miller would not be released and that no continuance would be granted. Vol. 5 A.M., 1388. The court again reiterated that if Mr. Marotta persisted in discharging Mr. Miller then he would have to proceed *pro se.* id. Mr. Marotta asked if Mr. Miller's questioning was undertaken on his or the court's behalf. Vol. 5 A.M., p. 1389. Upon receiving the court's response, Mr. Marotta reiterated that Mr. Miller was not his attorney. id.

Mr. Marotta requested an opportunity to retain new counsel. The court responded:

> "[y]ou must tell the lawyer retained he's not going to have any time to prepare the case. The case is going on. I don't know what lawyer would undertake it given those conditions . . . You must explain that to him. There will be no continuances." Vol. 5 A.M., p. 1390.

THE PECORA PROBLEM

Without any advance notice to the court or a request for an offer of proof outside the jury's presence, the prosecution called Rochester police officer Peter Pecora on Monday, September 24, 1984. *In Re Pecora,* 746 F. 2d 945, 946, 950 (2nd Cir., 1984). De-

spite defense objections and a defense suggestion that the court inspect pertinent documents, Mr. Pecora was allowed to testify about a conversation that he purportedly had with Mr. Marotta. Vol. 6 A.M., pp. 1840-1844.

The alleged conversation related to Pecora's recitation of what he purportedly learned from two unidentified informants and Mr. Marotta's supposed confirmation of a portion of Pecora's rendition. Vol. 6 A.M., pp. 1845-1848. The defense moved to strike the testimony. Vol. 6 P.M., pp. 1883-1887.

Mr. Miller reminded the court that Mr. Marotta had discharged him and reiterated that his presence had been commanded by the court. Mr. Miller added that he had no authority to cross-examine and that he would not cross-examine Pecora. Vol. 6 P.M., p. 1895. The court responded that "Mr. Marotta can cross-examine him." id.

The prosecutor was confronted with the alternate of disclosing the identity of Pecora's informants or having the testimony striken. The prosecutor argued that the testimony was admissible against Mr. Marotta without disclosure of the informants identity. Vol. 6 P.M., p. 1992.

The next day additional discussion was had about the Pecora problem. Vol. 7 A.M., pp. 2122-2171. The court instructed the jury that it should consider the testimony against Mr. Marotta if it was satisfied beyond a reasonable doubt that Mr. Marotta had adopted it. Vol. 7 A.M., 2171-2173. Later that day the jury was instructed that it could consider the evidence against Mr. Marotta only to the extent that he had "affirmatively adopted" it. Vol. 7 P.M., pp. 2216-2217.

In an attempt to avoid informant disclosure, the prosecution moved to strike the Pecora testimony as to all defendants includ-

ing Mr. Marotta. That motion was granted and the jury was so instructed. Vol. 11 P.M., pp. 3687-3690.

THE AFTERMATH

On the morning of Tuesday, October 2, 1984, present counsel appeared at the trial for the limited purpose of re-asserting Mr. Marotta's motions for mistrial or severance. Counsel had been engaged the previous evening. Vol. 10 A.M., p. 3077. Without any record support, the court claimed that Mr. Miller's previous representation of Monachino was a "well publicized fact." Vol. 10 A.M., p. 3079. The court absolved itself and the prosecution from any responsibility for the situation. Vol. 10 A.M., pp. 3081-3082. The court did agree to read a written submission adding that "I think you're just wasting your time." Vol. 10 A.M., p. 3083. In response to counsel's inquiry about a hearing, the court indicated that none was necessary. The court remarked that neither Mr. Miller nor Mr. Marotta had requested a hearing. Vol. 10 A.M., pp. 30799, 3084-3085.

The court then reaffirmed its position that,

> ". . . Mr. Miller must continue as his lawyer until he's otherwise relieved, and if he doesn't want Mr. Miller's representation, he must represent himself pro se." Vol. 10 A.M., p. 3085.

On October 4, 1984, counsel submitted a written memorandum signed by Mr. Marotta. The memorandum alternatively sought a mistrial, a severance and an evidentiary hearing. *Doc. 69, Marotta Memorandum. Counsel was given permission to make additional submissions. Vol. 12 A.M., pp. 3782-3783. An additional memorandum seeking the same relief was submitted. Doc. 70, Marotta's First Supplemental Memorandum.

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* Doc. references are to the documents as numbered in the Index to record on appeal.

Throughout the balance of the trial, Mr. Miller repeatedly sought the court's permission to leave. Those requests were summarily rejected. Vol. 14 A.M., pp. 4484, 4656.

STIPULATIONS

During the trial several stipulations were read to the jury by the prosecutor. Certain of those stipulations had not been approved either by Mr. Marotta or by anyone acting on his behalf. While again acting in a limited capacity, present counsel moved that those stipulations purportedly signed on Mr. Marotta's behalf be declared null as to Mr. Marotta. Vol. 19 P.M., p. 6583.

The problem involving the unsigned stipulations was initially raised by the prosecutor on October 12th, in connection with the witness Vega. Vol. 16 A.M., p. 5332. The court observed that the Vega stipulation could not be considered against Mr. Marotta. id. However, neither the court nor the prosecutor informed the jury that the Vega stipulation could not be considered against Mr. Marotta. Vol. 16 A.M., pp. 5336-5340. In fact, the court instructed the jury that stipulations were "agreements between the parties as to certain facts" adding that the jury "must take" such facts "as stipulated." Vol. 16 A.M., p. 5336.

Later that morning, the prosecutor complained that the admission of stipulations against all defendants other than Mr. Marotta would prejudice the prosecution by requiring testimony from additional witnesses. Vol. 16 A.M., p. 5419. The prosecutor was perturbed by Mr. Marotta's declination to sign stipulations. id. With the obviously self-serving contention that Mr. Marotta was appearing *pro se,* the prosecution improperly attempted to procure a court order directing Mr. Marotta to sign the stipulations. Vol. 16 A.M., p. 5420. Understandably, the court refused to issue any such order observing that the stipulations could "go in against the others." Vol. 16 A.M., p. 5421.

However, the court remarked that it would not permit Mr. Marotta "to hold up this trial" presumably by causing the production of additional prosecution witnesses. id.

The prosecutor made a second self-serving application that the court expressly invite Mr. Marotta to cross-examine in the jury's presence. id. In rejecting that application, the court acknowledged that Mr. Marotta was not qualified to cross-examine. Vol. 16 A.M., pp. 5421-5422.

At the conclusion of the colloquy, Mr. Marotta reiterated his desire not to proceed *pro se* and renewed his motions for mistrial and severance to obtain the "effective assistance of counsel." The renewed motions were summarily denied. Vol. 16 A.M., p. 5423.

That afternoon, the prosecutor stated that he would be reading certain stipulations which had not been agreed to by Mr. Marotta. The court observed that they could not be read against Mr. Marotta. Vol. 16 P.M., p. 5596. The prosecutor promised to alert all concerned that those stipulations were not to be considered against Mr. Marotta. id. However, when three stipulations were read later that day neither the prosecutor nor the court made any qualifying statement whatsoever. Vol. 16 P.M., pp. 5677-5683. On October 15, 1984 four stipulations were read to the jury without any limiting admonition from either the prosecutor or the court. Vol. 17 A.M., pp. 5750-5752, 5840-5845. On October 16, 1984 eight stipulations were read without any limiting instruction. Vol. 18 P.M., pp. 6427-6434.

The issue of Mr. Marotta's declination to sign stipulations resurfaced on October 17, 1984. Vol. 19 A.M., p. 6505. The court directed the prosecution to inform the jury about all stipulations which had not been ostensibly executed on Mr. Marotta's behalf. The prosecutor agreed to do so and acknowledged his failure to limit the previously read stipulaions. Vol. 19 A.M., pp. 6508-6509. Despite this directive and the prosecutor's promise to com-

ply, no limiting language was delivered with respect to the stipulations which had been read to the jury on October 12th, 15th and 16th. Vol. 19 A.M., pp. 6532-6574.

After further discussion with counsel, the court summoned Mr. Marotta, Mr. Miller and counsel for Mr. Piccaretto to the bench. Vol. 19 A.M., p. 6512. Initially, the court professed its desire to insure that Mr. Marotta understood what was occurring. Mr. Marotta responded that he thought his best course was not to stipulate. id. The court pressed the unrepresented defendant for his position on producing any of the witnesses. id. Understandably, Mr. Marotta expressed great confusion about what he should do and observed that he had no lawyer "to cross-examine" the witnesses. Vol. 19 A.M., p. 6516.

In an insidious attempt to posture Mr. Marotta as a *pro se* litigant, the court remarked that,

> "[N]o. Mr. Marotta, you won't be the first defendant who has appeared pro se and cross-examined a witness should you attempt to do so." id.

Mr. Marotta immediately reminded the court that he had "never agreed to go pro se." id. After acknowledging Mr. Marotta's refusal to proceed *pro se,* the court alluded to Mr. Miller's presence. Mr. Miller promptly reminded the court that he had been discharged. id.

The court's persistent attempt to extract Mr. Marotta's position concerning the witnesses precipitated renewal of the mistrial and severance motions. The renewed motions were summarily denied. Vol. 19 A.M., pp. 6516-6517. Mr. Marotta requested and was given the opportunity to communicate with present counsel. Vol. 19 A.M., pp. 6517-6518.

Present counsel appeared later that day. Vol. 19 P.M., p. 6583. Counsel moved that the stipulations purportedly signed on Mr.

Marotta's behalf be declared null. id. That motion was summarily denied. id. Counsel communicated Mr. Marotta's declination to execute the unsigned stipulations and his refusal to waive the right to confront the witnesses. Counsel renewed the severance and mistrial motions so that Mr. Marotta's right of confrontation could be exercised. The renewed motions were summarily denied. Vol. 19 P.M., pp. 6583-6584.

The prosecution opted not to summon any of the stipulation related witnesses and expressly elected to rely upon the "harmless error doctrine." Vol. 19 P.M., p. 6584.

THE INVITATION

While departing the courthouse, counsel was informed that the court would implement Mr. Marotta's discharge of Mr. Miller and permit present counsel to advise Mr. Marotta during the remainder of the trial. Vol. 19 P.M., pp. 6589-6590. Counsel reappeared and informed the court that he could not render such advice without an opportunity to analyze the case. The court responded that,

> "I understand that. I've told you I'm not going to give you any continuances. Just if he wants you to stay, you could. You can do what you want. I'm not going to stop the trial. I told you that." Vol. 19 P.M., p. 6590.

Given the court's inflexible position with respect to a continuance, counsel reiterated the impossibility of rendering meaningful advice to Mr. Marotta and departed. Vol. 19 P.M., pp. 6590-6591.

THE SENTENCE

On December 17, 1984 present counsel appeared with Mr. Marotta for sentencing. The court rejected the prosecution's request for the imposition of the maximum term of imprisonment

and sentenced Mr. Marotta to two concurrent twenty year prison terms.

In imposing the sentence, the court observed that,

> ". . . I don't think that the government's proof with respect to Mr. Marotta was of the caliber or to the extent of the other major defendants in this case. I put him in the same category, roughly, as Mr. Paone, and I make that finding based on just my observations and my evaluation of the evidence in the case as such. *I'm fully aware of the fact he has not had somebody here to advocate his position in that regard,* and I've tried to be particularly attentive to his concerns to the extent that I could, given my overall responsibility to the case. . . . He has the right to appeal. *He has grounds,* as we have already indicated to tend to pursue them under the appeal. . ." Vol. 31, pp. 8666-8667; emphasis supplied.

REASONS FOR GRANTING THE WRIT

The lower court action in this case constitutes a blatant repudiation of the right to conflict free counsel. The intervention of this Court is necessary to vindicate Petitioner's right to counsel and to remedy the lower court's departure from the accepted and usual course of judicial proceedings. The very integrity of the criminal justice system is at issue in this case.

This Court's review if also necessary to resolve a conflict among the circuits concerning the right to conflict free counsel. *United States v. Paone (Marotta),* 782 F. 2d 386 (2d Cir., 1986); *Walberg v. Israel,* 766 F. 2d 1071 (7th Cir., 1985); *Wilson v. Mintzes,* 733 F. 2d 424 (6th Cir., 1984), vacated at - U.S. -, 105 S. Ct. 317, on remand 761 F. 2d 275 (1985).

Moreover, the actions below are in conflict with the applicable decisions of this Court.

This Court has recently observed that,

> "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice . . . Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington,* - U.S. -, 104 S. Ct. 2052, 2067 (1984).

In reiterating its uniform practice of finding "constitutional error without any showing of prejudice" whenever counsel was absent, this Court observed that,

> "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic,* - U.S. -, 104 S. Ct. 2039, 2047, n. 25.

The mere presence of a lawyer "at trial alongside the accused" is insufficient to satisfy the Sixth Amendment right to counsel. *Strickland,* supra, - U.S. -, 104 S. Ct. at 2063; *Holloway v. Arkansas,* 435 U.S. 475, 490; 98 S. Ct. 1173, 1181 (1978).

This court had repeatedly recognized a criminal defendant's right to conflict free counsel. Only the client may waive that right. *Glasser v. United States,* 315 U.S. 60, 62, 62 S. Ct. 457 (1942); *Holloway v. Arkansas,* 435 U.S. 457, 483, 98 S. Ct. 1173, 1178 (1978); *Wood v. Georgia,* 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981).

Petitioner never waived his right to conflict free counsel. In fact, he attempted to exercise that right by discharging Mr. Miller and by objecting to Miller's continued presence.

Through unconscionable judicial compulsion, the Petitioner's only alternative to proceeding *pro se* was to remain encumbered by counsel with whom he had an irreconcilable conflict of interest and whom the court threatened with Bar Association sanction and grand jury investigation. Vol. 4 A.M., p. 1057; Vol. 4 P.M., pp. 10851086, 1097.

Despite its rebuke of Mr. Miller and its observation that prior prosecution counsel may have known of the prior representation, the trial court refused to conduct a hearing. Vol. 4 P.M., p. 1097; Vol. 10 A.M., pp. 3081, 3084.

Due to Mr. Miller's and the prosecution's derelictions and the trial court's needless intrusion, Petitioner's alleged connection to the enterprise was prejudicially reinforced. Both in appearance and in reality, Mr. Miller's efficacy as an advocate had been totally obliterated.

The trial court's persistent refusal to declare a mistrial, severance or a continuance precluded Petitioner from engaging substitute counsel. Vol. 5 A.M., p. 1390; Vol. 10 A.M., pp. 9, 14-15; Vol. 19 P.M., pp. 6590-6591. Although a trial court has broad discretion,

> ". . . an unreasoning and arbitrary 'insistence upon expeditiousness in the fact of a justifiable request for delay 'violates the right to the assistance of counsel." *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S. Ct. 841, 849 (1964); *Morris v. Slappy,* - U.S. -, 103 S. Ct. 1610, 1616 (1983).

CONCLUSION

For these reasons, the court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES of America, Appellee,

v.

Donald J. PAONE, Anthony M. Colombo, Joseph R. Rossi, a/k/a "The Hop", Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti, a/k/a "Red", Defendants-Appellants.

Nos. 84-1454, 84-1466, 84-1467, 84-1468, 84-1469, 84-1470 and 84-1471.

United States Court of Appeals,
Second Circuit.

Argued Dec. 16, 1985.

Decided Feb. 5, 1986.

Before TIMBERS, MESKILL and PRATT, Circuit Judges.

TIMBERS, Circuit Judge:

Appellants Donald J. Paone, Anthony M. Colombo, Joseph R. Rossi, Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti appeal from judgments of conviction entered December 17 and 21, 1984 in the Western District of New York, Thomas C. Platt, Jr., *District Judge,* sitting by designation.

Following a one and one-half month jury trial, appellants were found guilty of substantive violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and of conspiracy to violate RICO, 18 U.S.C. §§ 1962(c) and 1962(d) (1982). Three of appellants' co-defendants were acquitted by the jury. The district court sentenced each appellant to twenty years imprisonment on each of the two counts upon which they were convicted. Sentences were ordered to run consecutively for appellants Russotti, Piccarreto, Marino, Rossi, and Colombo. For

appellants Marotta and Paone, the sentences were ordered to run concurrently.

We find that the principal issues raised on appeal which warrant discussion in this opinion are (1) whether the admission of co-conspirators' statements at the trial violated the Federal Rules of Evidence or the confrontation clause of the Sixth Amendment; (2) whether appellant Marotta was denied his right to conflict-free counsel because his retained lawyer had represented a government witness seven years earlier; (3) whether the New York corroboration of accomplice testimony requirements is incorporated in a RICO prosecution; and (4) whether the testimony of a Rochester policeman, which the court eventually struck, was so prejudicial as to require a reversal. Other subordinate claims are raised.

Several appellants have adopted by reference points raised in the briefs of their co-appellants pursuant to F.R.A.P. 28(i).

For the reasons set forth below, we affirm the judgments of conviction of each appellant upon each count upon which he was convicted.

I.

We summarize only those facts believed necessary to an understanding of the principal issues raised on appeal.

Appellants' convictions arose from their participation in the conduct of a criminal enterprise in the Rochester, New York, area during an eleven year period. The indictment charged that between February 1971 and November 1982 appellants participated in a racketeering enterprise that extorted funds from gambling operations, and tried to prevent a rival group from encroaching on its control over gambling activities.

The predicate acts underlying the RICO charge encompassed a variety of serious offenses, including: the murder of Vincent Massaro; the murder of Thomas Didio; the attempted murders

of rival leaders; attempted arson, extortion, and obstruction of justice. Former members of the enterprise testified on behalf of the government regarding these offenses and about appellants' positions in the crime organization. Testimony disclosed that, before gambling joints could operate in the Rochester area, permission had to be obtained from the organization. The gambling clubs paid the organization between $400 and $1800 each week, even though the organization did not provide services to the clubs.

One of the predicate acts included in this RICO indictment was the 1973 murder of Vincent Massaro. In 1977 appellants Russotti, Piccarreto, Marino and Marotta were convicted of this offense in the New York Supreme Court for Monroe County. After they began serving their sentences, it was discovered that sheriff's deputies had committed perjury during the trial. On motion of the Monroe County District Attorney, the judgment was vacated, the indictment was dismissed, and these four appellants therefore were released. During their limited incarceration, disputes arose over the leadership of the organization. Some members were expelled from the organization. A rival group vied for control over the gambling operations. This "war between the factions" led to the murder of rival Thomas Didio, the attempted murder of Rosario Chirico, the attempted murder of Sonny Celestino, and the attempted arson of Chirico's place of business. The activities of this rival group are described in our opinion in *United States v. Barton,* 647 F.2d 224, 228-29 (2 Cir.), *cert. denied,* 454 U.S. 857 (1981).

There of course was a great deal of other evidence, some of which we shall refer to in our discussion of the principal claims of error which follows.

II.

The government presented its case primarily through the testimony of former members of the enterprise. Appellant Paone

claims that a number of co-conspirator statements concerning the activities of the enterprise were admitted in violation of the Federal Rules of Evidence and the confrontation clause of the Sixth Amendment. We disagree.

Under Fed.R.Evid. 801(d)(2)(E), a statement does not constitute hearsay if it is "offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Appellant asserts that the court allowed government witnesses to testify about statements which did not comply with the timing element that a statement can be made "during" the conspiracy and the motive element that a statement be "in furtherance" of the conspiracy.

[1] Appellant's claim that the court should not have admitted such statements under Rule 801(d)(2)(E) because they were not made "during" the conspiracy rests on the erroneous premise that the indictment related only to criminal conduct which occurred after 1978. The indictment, however, sets forth acts beginning as early as 1971. The RICO indictment centered on appellants' conduct in extorting funds from gambling houses in Rochester. The predicate acts can be traced readily to this criminal design. Vincent Massaro was killed because of his disobedience and his displeasure with his share of the proceeds from the racketeering activity. Also, the rift within the organization, which led to the murders and attempted murders of rival group leaders, erupted during the incarceration of the Massaro murder participants. The gambling houses provided the funds for the operation of the enterprise. Statements made before 1977 relating to the collection of these funds clearly were made during and in furtherance of the conspiracy. We cannot say that the conspiracy began as late as 1977. We therefore reject the claim that the 1973 Massaro murder and the gambling operations antedated the conspiracy. We also are not persuaded that the "in furtherance" requirement is a stringent as appellant urges.

Appellant points to portions of the testimony of government witness Thomas Pelusio as examples of narrative testimony that did not comply with the "in furtherance" requirement of Rule 801(d)(2)(E). Pelusio testified about a conversation concerning the Didio murder, a conversation in which he and some appellants participated. One appellant was reported as commenting on the manner in which Didio was killed, stating that it took only one bullet. Another appellant was reported as saying he wished that he had been present to watch Didio bleed. Other claims of error are based on the admission of testimony relating to 1975 and 1976 gambling operations and the 1973 Massaro murder.

[2] To begin with, in order to comply with the "in furtherance" requirement, there must be evidence that establishes the conspiracy and that the defendant participate in it. 4 Weinstein & Berger, Weinstein's Evidence § 801(d)(2)(E)[01], at 801-244 (1985); *United States v. Lieberman,* 637 F.2d 95, 102 (2 Cir.1980); *United States v. Lyles,* 593 F.2d 182, 194 (2 Cir.), *cert. denied,* 440 U.S. 972 (1979). We are satisfied that the participation of each appellant in the instant conspiracy was established. Once a conspiracy is shown to exist, the "evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Provenzano,* 615 F.2d 37, 45 (2 Cir.), *cert. denied,* 446 U.S. 953 (1980) (quoting *United States v. Head,* 546 F.2d 6, 9-10 (2 Cir.1976), *cert. denied,* 430 U.S. 931 (1977)).

[3] Appellant also asserts that the narrative descriptions by the government witnesses did not satisfy the "in furtherance" requirement. In *United States v. Birnbaum,* 337 F.2d 490, 495 (2 Cir.1964), we recognized that mere idle chatter will not satisfy what is now Rule 801(d)(2)(E). Frequently, however, such statements may be admitted as declarations against penal interest, *Lieberman, supra,* 637 F.2d at 103, or under the state of mind exception to the hearsay rule. *United States v. Cicale,* 691 F.2d 95, 103-05 (2 Cir.1982), *cert. denied,* 460 U.S. 1082 (1983). We also have recognized that the "in furtherance" requirement of Rule

801(d)(2)(E) is satisfied when a co-conspirator is apprised of the progress of the conspiracy, or when the statements are designed to induce his assistance. *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983); *United States v. Mangan,* 575 F.2d 32, 44 (2 Cir.), *cert. denied,* 439 U.S. 931 (1978). In light of those principles, we are satisfied that there was no error here.

[4] Even if some of the informants' testimony did cross the line, appellant has not convinced us that the instant trial was tainted by any such testimony that might not have comported with Rule 801(d)(2)(E). This trial extended over a period of one and one-half months. In a trial of this length, we are mindful that the chance that a single error, assuming arguendo that such did occur, would be significant enough to cause reversal or mistrial is not as great as appellants would have us believe. "Experience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *United States v. Jones,* 766 F.2d 994, 1004 (6 Cir. 1985) (quoting *In re Beverly Hills Fire Litigation,* 695 F.2d 207, 227 (6 Cir.1982), *cert. denied,* 461 U.S. 929 (1983)).

[5] In addition to his claim under Rule 801(d)(2)(E), appellant asserts that the admission of hearsay statements of co-conspirators violated his rights under the confrontation clause. The statements, according to appellant, did not contain sufficient indicia of reliability. Where co-conspirators' statements are so "crucial" to the prosecution and "devastating" to the defense, according to appellant, the confrontation clause is violated. We do not agree.

In *United States v. Puco,* 476 F.2d 1099, 1107 (2 Cir.), cert. denied, 414 U.S. 844 (1973), in commenting on a petition for rehearing, the Court made clear that, "[W]e did not and do not hold that a trial judge must find, before admitting a co-

conspirator's declaration, that it is not 'crucial' to the Government's case of 'devastating' to the defense." The court also stated:

> "For future applications of *Dutton* [*v. Evans,* 400 U.S. 74 (1970)] to similar situations, we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination. . . . In most cases the determination that a declaration is in furtherance of a conspiracy — a determination that the trial judge now must make in every case for admissibility — will decide whether sufficient indicia of reliability were present."

Id. at 1107 (footnote omitted). We also have recognized that "a higher standard of reliability is imposed if the hearsay statements are 'crucial' to the Government's case". *United States v. Stratton,* 779 F.2d 820, 830 (2 Cir.1985) (citing *Dutton v. Evans,* 400 U.S. 74 (1970)). As the *Puco* court indicated, however, the cases in which the requirements of the hearsay rule do not provide sufficient indicia of reliability to satisfy the confrontation clause will be rare. *Id.* at 1107-08. "This is true because a declaration in furtherance of a conspiracy would be against the penal interest of the declarant." *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983). *See also United States v. Wright,* 588 F.2d 31, 38 (2 Cir. 1978), *cert. denied,* 440 U.S. 917 (1979) (facts did not support departing from general rule that statements in furtherance of conspiracy contain sufficient indicia of reliability to satisfy confrontation clause).

In our view, the facts of the instant case do not warrant our departing from our earlier decisions. We decline appellant's invitation to require more support for a co-conspirator's statement than is required by Rule 801(d)(2)(E). We hold that the admission

of co-conspirator's statements did not violate the confrontation clause.

We acknowledge that the Supreme Court may address the issue of whether out-of-court statements must be addressed separately under the hearsay rules and the confrontation clause. The question appears to be presented in *United States v. Inadi,* 748 F.2d 812 (3 Cir.1985), No. 84-1580, *cert. granted,* 105 S.Ct. 2653 (May 25, 1985).

Appellant's third attack on the admission of co-conspirator declarations is his claim that the court made an inadequate *Geaney* finding. Under *United States v.* Geaney, 417 F.2d 1116 (2 Cir.1969), *cert. denied,* 397 U.S. 1028 (1970), where hearsay evidence in the form of a co-conspirator statement is admitted "subject to connection", the court must determine, when all the evidence has been received, whether the prosecution "has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence, independent of the hearsay utterances." 417 F.2d at 1120.

[6] Appellant asserts that the court was required to make a specific determination with respect to each defendant as to when he joined the conspiracy and the exact non-hearsay evidence that tied him to the conspiracy. There is not such requirement. In *United States v. Perez, supra,* 702 F.2d at 36, we held that "an implicit *Geaney* ruling can be inferred in the trial judge's decision to receive the evidence and to deny a directed verdict of acquittal on the conspiracy charge." Here, the court made a finding that each defendant was a member of the charged conspiracy. There was abundant evidence linking each defendant to the conspiracy. This is sufficient under both *Geaney* and *Perez.*

We hold that the court correctly admitted the co-conspirator's statements.

III.

[7] Several former members of the conspiracy testified on behalf of the government. Midway through the trial, government witness Monachino, a former member of the enterprise, disclosed on cross-examination that in 1975 attorney Richard Miller, who was representing appellant Marotta at the instant trial, had represented him, Monachino, in obtaining bail when Monachino was arrested on unrelated charges in 1975. Marotta thereupon requested that Miller be discharged as his attorney in the instant case. Marotta sought permission to retain new counsel. The court denied both requests after conducting an exhaustive colloquy with Monachino. Marotta claims that, since his retained attorney, seven years earlier, had represented a government witness who was testifying against Marotta in the instant case, his Sixth Amendment rights were violated. Marotta asserts that the disclosure that the same attorney at widely separated times had represented two men, each of whom was a member of the alleged conspiracy, so prejudiced the proceedings as to require a reversal and new trial. We disagree.

[8]While a defendant has a right to counsel of his choice under the Sixth Amendment, it is not an absolute right. *United States v. Ostrer,* 597 F.2d 337, 341 (2 Cir.1979). *See In Re Grand Jury Subpoena Served Upon John Doe, Esq. (SLOTNICK),* ____F.2d____, ____, (2 Cir.1986) (Jan. 9, 1986). Absent a conflict of interest, a defendant in a criminal case does not have the unfettered right to retain new counsel, particularly after trial has commenced. In determining whether to allow a defendant to retain new counsel, the court must consider whether a severance would then be required, the risks and problems associated with the delay, and whether substitutions would disrupt the proceedings and the administration of justice. *McKee v. Harris,* 649 F.2d 927, 931 (2 Cir.1981), *cert. denied,* 456 U.S. 917 (1982).

[9] We recognize that a defendant in a criminal case is entitled to conflict-free representation. *Cuyler v. Sullivan,* 446 U.S. 335,

349-50 (1980). For the reasons set forth below, however, we find that, if there was any conflict in the instant case, it was abated during the trial.

First, the government did not realize that attorney Miller previously had represented Monachino until the day before Monachino testified. Miller's representation of Monachino had been ten years earlier and was very limited. Miller had shared office space with Monachino's retained lawyer and merely had aided him in applying for bail. Monachino's need for legal representation at that time stemmed from criminal charges wholly unrelated to the instant case. Miller had not represented Monachino in any way since 1975. Second, Monachino waived any attorney-client privilege he had. As Marotta concedes, Miller subjected Monachino to a "disastrous" cross-examination. Third, following a detailed inquiry into the extent of the relationship between Monachino and Miller, the court carefully informed the jury of the limited nature of the prior representation. The court also explained to the jury that there was a limited universe of criminal defense lawyers in the geographic region and that such past representation was not unusual.

The situation here was not nearly as problematic as in the cases which appellant cites where we held that a defendant was denied his right to effective assistance of counsel. *E.g., United States v. Cancilla,* 725 F.2d 867, 870 (2 Cir.1984) (attorney who had engaged in similar criminal conduct lacked incentive to conduct a vigorous defense); *Solina v. United States,* 709 F.2d 160, 167-69 (2 Cir.1983) (defendant represented by unlicensed attorney).

Particularly in light of the trial court's careful instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any prejudice to Marotta, we hold that the court ruled correctly in refusing to allow Marotta to discharge his trial counsel and to retain new counsel midway through the trial that lasted one and one-half months.

IV.

[10] Six of the predicate acts underlying the RICO indictment were New York state law offenses of murder, attempted murder and attempted arson. Appellant Marino claims that, since New York state law requires corroboration of accomplice testimony to prove these offenses, such acts did not comply with the definition of "racketeering activity" under RICO. We disagree.

The RICO statute, 18 U.S.C. § 1961(1)(A) (1982), defines "racketeering activity" as "any act or threat involving murder, kidnaping, gambling, arson, robbery, extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year". (emphasis added). Appellant claims that, if an accused cannot be charged in the New York state courts for these offenses in the absence of accomplice testimony corroboration, he cannot be charged under the federal RICO statute. The court overruled appellant's claim in this respect at the close of the government's case and during the pre-charge conference.

We are satisfied that Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge. *United States v. Licavoli,* 725 F.2d 1040, 1047 (6 Cir.), *cert. denied,* 104 S.Ct. 3535 (1984). To adopt appellant's reading of "chargeable" would result in precisely the same criminal act, proscribed by the laws of two states, being the basis of a RICO violation in one state but not in the other — simply because of differences in what are essentially procedural rules. As in *United States v. Bagaric,* 706 F.2d 42, 62-63 (2 Cir.), *cert. denied,* 464 U.S. 840 (1983), we refuse to sanction such inconsistent results. Other courts' interpretations of § 1961(1)(A) support our interpretation of the statute. *See, e.g., United States v. Brown,* 555 F.2d 407, 418 n. 22 (5 Cir.1977), *cert. denied,* 435 U.S. 904 (1978) (rejecting Georgia's accomplice testimony cor-

roboration requirement in a RICO prosecution); *United States v. Licavoli, supra,* 725 F.2d at 1047, and cases cited therein (even though Ohio law precludes separate punishment for conspiracy to murder and murder, each can serve as separate predicate act in a RICO prosecution).

We hold that the district court correctly ruled that the New York corroboration of accomplice testimony requirement is not incorporated in a RICO prosecution.

V.

[11] Officer Pecora of the Rochester police department was called as a government witness at trial. Pecora's testimony included relating his June 18, 1978 conversation with appellant Marotta. Pecora had relayed to Marotta a description of the "mob war" in the Rochester area, based on descriptions which two informants had provided. Pecora testified that he asked Marotta to comment on the informants' stories. Pecora then repeated in court Marotta's reaction to the informants stories. Pecora's testimony also described appellants Russotti and Piccarreto as leaders of the organization. This hearsay testimony by Pecora on direct examination included the following:

> "Q. What else did you tell him?
>
> A. I also told Mr. Marotta that the first man stated that Sammy Gingello had declared himself over Samuel Russotti and Rene Piccarreto, and that there was no more equal power.
>
> I also told him that the man had stated to me that at approximately two weeks after the murder of Sammy Gingello that the A and the B team had a meeting, and it was suggested that this city be split into two parts with the river — or Main Street being the dividing line; that the A team found this acceptable, but the B team did not, and was primarily opposed to Sonny Celestino, and nothing was resolved at this meeting.

The bombings continued, and — both the A and B team became disorganized. He also stated that the A team was losing its hold by not being effective in taking care of the B team. Also stated to—

. . .

Q. What did you tell him the second man had stated to you?

A. The second man stated that in regards to the beating incident, that the whole problem would have ended with the beatings, but then the pipe bomb was found on Clifford Avenue and that started it all over again.

He stated that — the second man stated that the power structure of Samuel Gingello, Red Russotti and Rene Piccarreto was the same when they got out of jail as it was when they went to jail.

He also stated that the A team was suffering financially as a result of the bombings, and they were having difficulty — the A team was having difficulty — difficulty locating members of the B team.

He also stated that the problem would not be resolved unless at least these people are eliminated.

He also stated that members of the motorcycle club were probably the people that associated with Thomas Torpey.

After telling him these things, Mr. Marotta responded only by saying that he agreed with — with the beatings, what happened in the beatings, but he said there was — he was not sure that exactly happened because he was in jail at the time.

He did say that — those members, those men, were told that—

. . ."

The court first admitted the testimony tentatively, subject to later consideration. The court thereafter considered striking the testimony completely if Pecora did not disclose the identify of the informants. The court next decided to instruct the jury that the testimony was admissible against Marotta only. When Pecora

was recalled for cross-examination, the court finally instructed the jury to disregard completely the controversial testimony of Pecora. Pecora refused to disclose the identity of the informants and was held in contempt.

Pecora appealed to this Court from the order holding him in civil contempt. We vacated the contempt order, holding that Pecora was not required to disclose the identity of the informants since the court had struck Pecora's testimony. *United States v. Russotti,* 746 F.2d 945, 950 (2 Cir.1984). We observed that at that point in the trial the record did not establish such prejudice as to require a retrial because of the Pecora episode. *Id.* Our careful examination of the entire record, including events subsequent to Pecora's being held in contempt, satisfies us that nothing in the Pecora episode warrants disturbing the judgments of conviction.

Appellant Russotti, joined by several of the other appellants, argues that, even though the court struck the testimony eventually, its disclosure was so prejudicial as to require a reversal. Appellants assert that the jury was left with the impression that the informants existed, that what they said was true, and that the officer's reliance on the unnamed informants gave the government's witnesses who were former members of the enterprise increased credibility.

Appellants rely on *Bruton v. United States,* 391 U.S. 123 (1968), for the proposition that their inability to cross-examine the sources of Pecora's testimony violated the confrontation clause. In *Bruton,* the jury had been asked to apply a confession obtained after arrest to the hearsay declarant but not to his co-defendant. The issue before us is whether the court's instruction to the jury to disregard completely the testimony relating to the June 18 conversation was sufficient to obviate any prejudice to appellants.

Appellants Russotti and Piccarreto claim particular prejudice because they were identified as leaders in the organization. Other witnesses, however, testified as to the conduct and leadership po-

sitions of these same appellants in the organization. We are satisfied that the claimed prejudice was not as "devastating" as appellants assert. Moreover, unlike the situation in *Bruton,* the jury was not asked to apply the testimony to only some appellants, nor were these hearsay declarations made "post-arrest".

While we do not applaud the sequence of events here, we are mindful that occasions do arise, particularly during the course of a long trial, where, on balance, it is in the interest of the fair administration of criminal justice that a jury be given corrective instructions. We hold that this is such a case. *See United States v. Nixon,* 779 F.2d 126, 133 (2 Cir.1985). The jury was not asked to perform olympian mental gymnastics. Indeed, the court's expression of grave concern over this testimony during the trial may well have redounded to the benefit of appellants because the court emphasized to the jury the importance of disregarding the testimony entirely.

We hold that the court's corrective instruction to the jury, together with the factors referred to above, obviated any prejudicial impact of Pecora's testimony upon any of the appellants. We hold that the court did not err in any respect in its handling of the Pecora episode, including its refusal to grant appellants' motion for a mistrial.

[12] We believe it is appropriate and necessary to add a word of caution to the government. Preparation for and conduct during this long and somewhat complicated case no doubt were taxing on both the prosecution and defense counsel, as well as on the court. The government's proffer of Pecora's testimony, however, more resembled risk-creating improvisation than fine-tuned choreography. The government should have avoided this potential for prejudice by screening the testimony with appellants' counsel and the court before trial rather than plunging ahead with such hearsay testimony. After carefully reviewing the record, we believe that the government did not intentionally mishandle the proffer of Pecora's testimony. The scrutinizing trial judge abated

the potential prejudice. He displayed the patience of Job and the wisdom of Solomon throughout. We nevertheless reiterate the admonition to government counsel which Judge Newman stated in one aspect of this very case, *United States v. Russotti, supra,* 746 F.2d at 950, except that we underscore that admonition. United States attorneys are charged with knowledge of the decisions of this Court in criminal cases. Any disregard of our admonition in future cases will be dealt with accordingly.

VI.

Appellants have raised other subordinate claims of error which we do not believe merit discussion.

For example, appellants' claim that the inclusion of the 1973 Massaro murder as a predicate act violated the double jeopardy clause of the Fifth Amendment was rejected by us in an interlocutory appeal. *United States v. Russotti,* 717 F.2d 27 (2 Cir.1983), *cert. denied,* 465 U.S. 1022 (1984). We hold that there is no reason to disturb that decision.

Other subordinate claims of error include whether the predicate acts under RICO were charged and proven adequately; whether the court abused its discretion in denying mid-trial requests for delay; whether the court properly excluded prior sworn testimony of two appellants; whether the court properly refused to allow appellant Marotta's attorney to be called as a witness; whether the government used immunized testimony in its prosecution; and whether consecutive sentences could be imposed for conspiracy and substantive violations of RICO.

We have carefully examined all claims of error raised by all appellants and we find none has merit.

VII.

To summarize: We hold that the admission of the co-conspirators' statements violated neither the requirements of Fed.R. Evid. 801(d)(2)(E) nor the confrontation clause of the

Sixth Amendment; the limited representation of a government witness by appellant Marotta's retained counsel did not violate Marotta's right to conflict-free counsel; appellants' argument that the New York corroboration of accomplice testimony requirement is incorporated in the RICO definition of racketeering activity is without merit; the court's limiting instruction to the jury was sufficient to obviate any prejudice resulting from Officer Pecora's hearsay statements; and all of appellants' other claims of error, having been carefully considered, are without merit.

Appellants were convicted after a one and one-half month trial on the basis of overwhelming evidence of extraordinarily serious offenses committed over a period of time beginning fifteen years ago. We order that the mandate issue forthwith.

Affirmed.

WDNY
CR 82-156
PLATT

United States Court of Appeals

for the
SECOND CIRCUIT

FILED FEB 5. 1986, United States Court of Appeals, Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of February one thousand nine hundred and eight-six.

Present: HON. WILLIAM H. TIMBERS, HON. THOMAS J. MESKILL, HON. GEORGE C. PRATT, Circuit Judges,

UNITED STATES OF AMERICA, Appellee, -V- DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH R. ROSSI, a/k/a "THE MOP", THOMAS E. MAROTTA, RICHARD J. MARINO, RENE PICCARRETO, and SAMUEL J. RUSSOTTI, a/k/a "RED", Defendants-Appellants.	Docket Nos. 84-1454 84-1466 84-1467 84-1468 84-1469 84-1470 84-1471

Appeals from the United States District Court for the Western District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk
/s/ By: Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
/s/ ELAINE B. GOLDSMITH
Clerk
(Seal)

FILED MAR 19, 1986, United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of March one thousand nine hundred and eighty-six.

UNITED STATES OF AMERICA, Appellee,

v.

THOMAS E. MAROTTA
Defendant-Appellant.

Docket No. 84-1468
84-1454 (L)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-appellant, Thomas E. Marotta.

Upon consideration by the panel that heard the appeal, it is

Order that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

Nos. 85-1883, 85-1892, 85-1901, 85-1902 and 85-1949

In the Supreme Court of the United States

OCTOBER TERM, 1986

Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

THOMAS E. MAROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

DONALD J. PAONE, PETITIONER

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v.

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government is precluded under the Double Jeopardy Clause from including a predicate offense in a Racketeer Influenced and Corrupt Organizations Act (RICO) indictment where that offense purportedly could have been, but was not, included in a prior RICO indictment, charging a separate "pattern of racketeering," on which petitioners were acquitted.

2. Whether a New York rule requiring corroboration of accomplice testimony must be applied in a federal RICO prosecution.

3. Whether the admission of co-conspirator statements violated the Confrontation Clause on the ground that the court of appeals assertedly failed to require those statements to be independently analyzed for reliability.

4. Whether petitioner Marotta was denied his right to conflict-free counsel at trial because his attorney, some ten years earlier, had briefly represented a government witness on an unrelated matter, and whether the other petitioners were prejudiced by this purported conflict of interest.

5. Whether the district court properly refused to allow petitioner Marino to call Marotta's attorney as a witness during trial.

6. Whether the district court correctly refused to admit the prior testimony of two of the defendants where the federal government was not a party to, nor a participant in, the proceedings giving rise to the testimony.

7. Whether consecutive sentences may be imposed for conspiracy and substantive violations of the RICO statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1883

THOMAS E. MAROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1892

DONALD J. PAONE, PETITIONER

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RICHARD J. MARINO and JOSEPH R. ROSSI, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 782 F.2d 386. The opinion of the court of appeals on a prior interlocutory appeal in the same case (85-1902 Pet. App. B1-B18) is reported at 717 F.2d 27.[1]

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1986. Petitions for rehearing were denied on March 19 and 24, 1986 (Pet. App. A20; 85-1892 Pet. App. A23-A24). The petition for a writ of certiorari in No. 85-1883 was filed on May 15, 1986; the petitions in Nos. 85-1892, 85-1901, and 85-1902 were filed on May 16, 1986; and the petition in No. 85-1949 was filed on May 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d). Each petitioner was sentenced to 20 years' imprisonment on each of the two counts. Petitioners Russotti, Piccarreto, Marino, and Rossi received consecutive sentences on the two counts, while petitioners

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 85-1883. "Tr." refers to the trial transcript.

Marotta and Paone received concurrent sentences.[2] The court of appeals affirmed (Pet. App. A1-A17).

The evidence at trial, which was presented over eight weeks and consumed more than 8,000 pages of transcript, established that between 1971 and 1982 petitioners belonged to an organized crime group in the Rochester, New York, area that engaged in the extortion of gambling clubs. To maintain control over the gambling clubs—and to discipline dissident members, combat rival groups, and avoid prosecution—the members of the group engaged in murder, attempted murder, arson, and obstruction of justice. In particular, the indictment charged petitioners with committing, as acts of racketeering, two murders, three attempted murders, two acts of extortion, an attempted arson, and three obstructions of justice.

The evidence showed that in February 1971, Angelo Monachino and Vincent Massaro were inducted into a criminal organization known as the "mafia" or "La Cosa Nostra" in a ceremony at the home of Frank Valenti, the boss of the organization (Tr. 898-904, 913-915, 920). Thereafter, in 1972, Valenti was deposed and petitioner Russotti became the boss (Tr. 927-930). At the same time, Sam Gingello became the underboss, petitioner Piccarreto became the counselor, and petitioners Marino and Marotta became captains (Tr. 927). Under Russotti's direction, Marino was assigned to supervise Monachino, Massaro, Spike Lanovara, and Eugene DiFrancesco (Tr. 932). During the years following Russotti's accession to leadership, new recruits were admitted

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[2] Three co-defendants, Joseph J. Trieste, Joseph L. LaDolce, and John M. Trivigno, were acquitted at trial. Co-defendant Anthony M. Colombo was convicted at trial, but he has not petitioned for certiorari.

into the organization, including John Fiorino, Thomas Didio, and petitioners Paone and Rossi (Tr. 934-937).

In November of 1973, Eugene DiFrancesco advised Monachino that Piccarreto had ordered him to "hit" Vincent Massaro. Massaro, DiFrancesco reported, had disobeyed the leadership and complained about not being paid (Tr. 938-940, 947). DiFrancesco asked Monachino to help him carry out the "hit" (Tr. 940). When Monachino and DiFrancesco failed to execute Massaro promptly, Piccarreto met with Russotti, Marino, Gingello, and Monachino, and directed Monachino to take charge of the project personally (Tr. 948-952). Marino suggested that the murder be committed at Monachino's place of business (Tr. 953).

Following orders, Monachino, DiFrancesco, and Lanovara lured Massaro to Monachino's office; there, DiFrancesco shot Massaro in the back of the head and killed him (Tr. 964-965, 967-968). Monachino, DiFrancesco, and Lanovara then put Massaro's body in the trunk of his car, where it was later discovered (Tr. 975). Monachino and DiFrancesco thereafter told Marino that the job was done. Marino congratulated them (Tr. 981-982).[3]

In 1973, Thomas Pelusio obtained permission from petitioner Marotta to open an illegal gambling club in Rochester (Tr. 4159-4160, 4165). Although Marotta provided no services to the club, Pelusio paid Marotta a weekly fee for permission to operate (Tr. 4163-4164). During the following years, Pelusio, again after obtaining permission from Marotta or another organization member, opened several other

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[3] The murder of Vincent Massaro formed the basis for the first racketeering act, charging solicitation and conspiracy to murder Massaro.

gambling clubs in Rochester. In each instance, he made regular payments to Marotta, Didio, or Paone (Tr. 4169-4186). Pelusio understood that if he did not make his weekly payments to the members of the organization, his clubs would not be allowed to operate (Tr. 4182).

In 1976 and 1977, Gingello and petitioners Russotti, Piccarreto, Marino, and Marotta were tried and convicted in state court for the murder of Vincent Massaro (Tr. 6535, 6782). They were imprisoned in early 1977 (Tr. 4190, 6782). Because of his incarceration, Gingello chose Didio to assume his position in the organization (Tr. 4185-4186). During this period of imprisonment, however, because of dissatisfaction with the performance of Didio and his associates, a rift developed within the organization (Tr. 4191). Eventually, a faction led by Didio was expelled from the organization, and two rival factions vied for control of the gambling clubs (Tr. 2731-2734, 2738-2739).

In the fall of 1977, the defendants in the Massaro murder case were released from prison because it was discovered that local law enforcement officers had testified falsely at their trial (Tr. 2723, 2738, 2743-2746, 6535). Gingello's release, and his resumption of a leadership role in the organization, precipitated further violence between the two competing factions. In April 1978, a car bomb killed Gingello (Tr. 1687, 2755). The remaining members of Gingello's faction, which included the six petitioners and their associates Anthony Oliveri and John Fiorino, made plans to pursue those they deemed responsible for Gingello's murder, including Didio, Dominic Celestino, and Rosario Chirico (Tr. 2756-2758, 2767-2769, 2770, 2823-2824, 3553-3556, 4209-4211, 5882).

During May 1978, in furtherance of this revenge scheme, Rossi told Oliveri to follow Chirico in order to determine if there was any way to "get at him" (Tr. 2779). Oliveri thereafter recruited co-defendant Anthony Colombo to shoot Chirico in a wooded area between Chirico's home and his place of business (Tr. 2787-2795). Rossi provided Oliveri with a rifle and a motorcycle driver to assist in his escape (Tr. 2796-2798). On May 25, 1978, Colombo shot at Chirico but only wounded him (Tr. 2806, 6548). When Rossi learned that Chirico had been hit, he commented that "at least we got that much done" (Tr. 2806).[4]

Rossi next directed Oliveri to kill Celestino (Tr. 2813-2814). On June 18, Colombo, Rossi, and Oliveri lay in wait near Celestino's home (Tr. 2815-2816). Their murder attempt failed, however, because Celestino had been arrested earlier that day (Tr. 2816-2818).[5]

Following the attempt to shoot Celestino, Rossi told Oliveri to try to kill Didio, the leader of the rival faction. Fiorino and Paone were also assigned to find Didio (Tr. 2830-2832, 2836-2837). On July 5, 1978, Rossi, Colombo, and Oliveri drove to a motel in the Rochester area where Didio's girlfriend had been seen (Tr. 2852-2853). After the girlfriend departed, Colombo fired a machine gun into the room she had left, killing Didio (Tr. 2857-2863, 6429-6430).

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[4] The attempted murder of Rosario Chirico formed the basis for the second racketeering act, charging solicitation, conspiracy, and attempt to murder Chirico.

[5] The attempted murder of Dominic Celestino formed the basis for the third racketeering act, charging solicitation, conspiracy, and attempt to murder Celestino.

Oliveri, Colombo, and Rossi then sped from the scene. After the men abandoned their weapons and car, Marotta picked them up. Rossi reported, "I think we got him," and Marotta responded, "good" (Tr. 2864-2867).[6]

Following the murder of Didio, Rossi directed Oliveri to burn down the automotive body shop owned by Chirico in order to force him to leave town (Tr. 2883).[7] Oliveri and an associate unsuccessfully attempted to carry out this order, using gasoline and an incendiary device known as a "molotov cocktail" (Tr. 2884, 5598-5607, 5645).

At the same time that the revenge plots were being executed, Rossi and Oliveri assumed responsibility for collecting the ongoing payments from the gambling clubs (Tr. 2739, 2771-2776, 4200). Rossi would take the money to Russotti, Oliveri and Paone (Tr. 2776-2778). After Thomas Torpey, who owned one of the clubs, stopped making his weekly payments, he was visited by members of the organization, first by Piccarreto and Marino, and later by Russotti and Piccarretto. Russotti told Torpey, "You've got something going on in this town. I want a piece of it" (Tr. 4955). Finally, John Fiorino threatened to close the club because Torpey was not paying (Tr. 4976-4978). Fiorino threatened Torpey, "You know, you're no su-

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[6] On a later occasion, Paone said he was surprised that it only took one bullet to kill Didio. He added that he was also surprised that with all the bullets that were fired, only one had hit Didio (Tr. 4215). The murder of Thomas Didio formed the basis for the fourth racketeering act, charging solicitation, conspiracy, and the murder of Didio.

[7] Russotti had earlier tried to obtain some dynamite for the same purpose (Tr. 5884-5890).

perman. You can bleed and die like anybody else" (*ibid.*).[8]

In January 1979, Angelo DiMarco, an owner of one of the clubs making payments to Rossi, was subpoenaed to appear before a federal grand jury (Tr. 1688-1697, 1691-1693, 1726, 2775-2776). When he appeared, DiMarco described to the grand jury how he had given envelopes of cash to an employee every week for delivery to Rossi (Tr. 1728). Shortly thereafter, Rossi directed Anthony Oliveri to kill DiMarco, and he provided the weapons and a car for the murder (Tr. 2900, 2904, 2907). As Oliveri and Colombo waited near DiMarco's house, armed with a shotgun and pistol, a police car approached them and the two men were arrested (Tr. 2909, 2916).[9]

Vincent Rallo, an insurance broker, had arranged on Marino's behalf to register and insure in the names of fictitious persons the cars that were used in the murder of Thomas Didio and the attempted murder of Angelo DiMarco (Tr. 5892-5907, 5921-5934). After Oliveri and Colombo were arrested in one of those cars, Rallo told Marino that he was afraid the car would be traced to him (Tr. 5934). When Rallo was subsequently subpoenaed to appear before a federal grand jury, Marino told him to testify falsely by inventing descriptions of the fictitious persons in whose names the cars had been registered (Tr. 5936).

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[8] Extortions from two of the clubs formed the basis of the eighth and ninth racketeering acts, each charging the conspiracy, attempt, and actual commission of a federal extortion offense.

[9] The attempted murder of DiMarco and the related obstruction of justice formed the basis for the fifth and sixth racketeering acts, charging the state offenses of solicitation, conspiracy, and attempted murder of DiMarco, and the federal offense of obstruction of justice.

Early in 1981, Rallo decided to cooperate with the government. In that capacity, he tape-recorded three discussions he had with Marino regarding the progress of the government's investigation. In the course of those discussions, Marino gave Rallo instructions about how to testify before the grand jury (Tr. 5938). The recordings of those discussions were played for the jury at trial (Tr. 5955, 5974, 5977).[10]

ARGUMENT

1. Petitioners Piccarreto and Marino renew their contention (85-1902 Pet. 6-13; 85-1949 Pet. 18-25)—previously raised and rejected by the court of appeals in an interlocutory appeal (85-1902 Pet. App. B1-B18)—that the Double Jeopardy Clause precluded the government from including the 1973 Massaro homicide as a racketeering predicate in this indictment. The Massaro homicide should not have been included, they argue, because that crime could have been charged as a predicate act in a 1976 racketeering indictment on which petitioners were acquitted. In rejecting this argument once before, the court of appeals held that the two indictments charged two distinct patterns of racketeering: the earlier indictment had charged an arson-for-insurance scheme, while the present one charged a pattern of extortion. 85-1902 Pet. App. B10-B16. The Massaro murder, the court of appeals noted, was charged "as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme*—a scheme which had no relationship to the 1976 arson-for-hire activity" (85-1902 Pet. App. B15-B16 (emphasis in original)). Be-

[10] The obstruction of justice with regard to Vincent Rallo formed the basis for the seventh racketeering act, charging the federal offense of obstruction of justice.

cause the two indictments could be separately prosecuted without offending the Double Jeopardy Clause, and because the Massaro murder was properly charged as part of the pattern of racketeering activity alleged in the second indictment, the government was not barred from including that offense as a predicate act in this case.

Following the court of appeals' earlier rejection of their double jeopardy claim, petitioners sought certiorari and made the same arguments they are making now. We argued in our brief in opposition to certiorari (Nos. 83-696 and 83-713) that the decision of the court of appeals was correct, and this Court denied review. In the present case, the court of appeals once again rejected petitioners' arguments (Pet. App. A16). Nothing has changed that would warrant further review of this issue at this time. We therefore rely on our previous submission in opposing this claim.[11]

2. Petitioners Marino and Rossi assert (85-1949 Pet. 3-8) that the definitional section of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961(1), incorporates state procedural provisions—in this case, the New York rule requiring that the testimony of accomplice witnesses be corroborated. Because the district court purportedly failed to require corroboration in this case, petitioners contend that the six predicate acts involving murder or attempted murder did not qualify as acts of "racketeering activity" within the meaning of Section 1961(1).[12] The court of appeals rejected that argu-

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[11] We are providing petitioners with copies of our brief in opposition in Nos. 83-696 and 83-713.

[12] It is well established that under federal law a conviction can properly rest on the uncorroborated testimony of an accomplice. See *Caminetti* v. *United States*, 242 U.S. 470, 495

ment, as has every other circuit that has considered it.

The courts of appeals have uniformly held that the reference in Section 1961(1) to crimes "chargeable under State law" is intended "simply to define the wrongful conduct, and not to incorporate state procedural law." *United States* v. *Licavoli*, 725 F.2d 1040, 1047 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). The courts have consistently refused to incorporate state procedural rules such as the requirement that accomplice testimony be corroborated, see *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); the law of merger, see *United States* v. *Licavoli*, 725 F.2d at 1046-1047; state speedy trial rules, see *United States* v. *Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979); and state statutes of limitations, see *United States* v. *Brown*, 555 F.2d at 418 n.22.[13] See generally *United States* v. *Nardello*, 393 U.S. 286 (1969) (reference in Travel Act to state "extortion" statutes encompasses any conduct that would generally be classified as ex-

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(1917); *Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

[13] The same principle applies to other federal statutes that incorporate state criminal charges for definitional purposes. See *United States* v. *Steele*, 685 F.2d 793, 807 (3d Cir.), cert. denied, 459 U.S. 908 (1982) (18 U.S.C. 1952); *United States* v. *Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982) (18 U.S.C. 1952); *United States* v. *Cerone*, 452 F.2d 274, 286-287 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972) (18 U.S.C. 1952); *United States* v. *Corallo*, 413 F.2d 1306, 1322-1323 (2d Cir.), cert. denied, 396 U.S. 958 (1969) (18 U.S.C. 1952); *United States* v. *Revel*, 493 F.2d 1, 2-3 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) (18 U.S.C. 1955).

tortionate, regardless of the label given to the conduct by state law).[14]

3. Petitioners Paone, Marino, and Rossi challenge (85-1892 Pet. 9-18; 85-1949 Pet. 15-18) the admission of certain co-conspirator declarations. They argue that under the Confrontation Clause a trial court may not admit co-conspirator declarations unless it first finds that they contain special "indicia of reliability." The short answer to this claim is that the court of appeals employed precisely the analysis urged by petitioners; the court simply reached a result with which petitioners disagree. Because petitioners have already had the benefit of the constitutional rule they propose, their claim reduces to the fact-bound contention that the court of appeals misapplied that rule in this case.

a. In rejecting petitioners' claim, the court of appeals based its analysis on the court's earlier decision

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[14] Petitioners' argument, taken to its logical limits, would significantly impair the effectiveness of the RICO statute. For example, New York grand jury law—in addition to the rule requiring corroboration of accomplices—prohibits the use of hearsay, see N.Y. Crim. Proc. Law § 190.30 (McKinney 1982), and the government's impeachment of witnesses it has called before the grand jury, see *People* v. *Fiore*, 112 Misc. 2d 45, 48, 445 N.Y.S.2d 960, 961-962 (Nassau County Ct. 1981). Every grand jury witness, moreover, is automatically entitled to immunity, see N.Y. Crim. Proc. Law § 190.40 (McKinney 1982), and the government may seek an indictment only where there is sufficient evidence to convict at trial, see *People* v. *Monroe*, 125 Misc. 2d 550, 480 N.Y.S.2d 259 (Sup. Ct. 1984). If, as petitioners suggest, the RICO statute adopts state procedural rules, the effectiveness and uniform application of the statute would be substantially undermined because of the wide assortment of applicable state procedural rules that would govern the conduct of federal grand jury and trial proceedings.

in *United States* v. *Puco*, 476 F.2d 1099, 1107 (2d Cir.), cert. denied, 414 U.S. 844 (1973). As in *Puco*, the court of appeals in this case held that when a co-conspirator's out-of-court statement is offered into evidence, the trial judge must determine whether the statement bears " 'sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination' " (Pet. App. A7 (quoting *Puco*, 476 F.2d at 1107)). The court further noted that it had previously recognized that " 'a higher standard of reliability is imposed if the hearsay statements are "crucial" to the Government's case.' " *Ibid.* (quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)). Nonetheless, the court observed, only rarely will a statement otherwise admissible under the hearsay rules fail to contain the indicia of reliability required by the Confrontation Clause. Because of the nature of the statements at issue in this case, the court held, no detailed reliability analysis was required (Pet. App. A7).

Contrary to petitioners' assertion, this Court's decision in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), does not require a different result. In *Roberts*, this Court rejected a Confrontation Clause challenge to the admission at trial of testimony that had been given at a preliminary hearing. The Court stated (448 U.S. at 65-66) that the Confrontation Clause requires that out-of-court statements offered at trial must ordinarily be shown to be reliable. Significantly, however, the Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66. Because the rule governing co-conspirator statements is just such a firmly rooted hearsay exception, we submit that *Roberts* supports the view that the Con-

frontation Clause does not require a separate inquiry into the reliability of statements that are found to satisfy the traditional co-conspirator declaration rule, see Fed. R. Evid. 801(d)(2)(E).[15]

To be sure, there is a conflict among the circuits on the question whether the Confrontation Clause requires a further "reliability review" beyond the reliability judgment assured by the requirements of Rule 801(d)(2)(E). Several circuits do not require a further examination of a statement's reliability, once that statement has been found to satisfy the co-conspirator declaration rule. See *United States* v. *Chindawongse*, 771 F.2d 840, 845-847 (4th Cir. 1985), cert. denied, No. 85-735 (Jan. 21, 1986); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Other courts, including the Second Circuit, require a separate reliability analysis under the Confrontation

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[15] Much of what this Court said about co-conspirator declarations in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), underscores this point. There, the Court refused to apply to co-conspirator statements a rule, applicable to prior testimony, requiring a preliminary determination of the declarant's unavailability. While expressly declining to decide whether trial courts must subject such statements to an independent reliability test (slip op. 4 n.3), the Court took special account of the "evidentiary significance of statements made when the conspiracy was operating in full force" (*id.* at 8). In light of these special features, the Court chose "to affirm the validity of the use of co-conspirator statements" and "decline[d] to require a showing of the declarant's unavailability as a prerequisite to their admission" (*id.* at 12-13).

Clause, even after the statements have passed muster under the rules of evidence. See, *e.g.*, *United States* v. *DeLuna*, 763 F.2d 897, 909-911 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Arbalaez*, 719 F.2d 1453, 1459-1460 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *United States* v. *Ammar*, 714 F.2d 238, 256-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983). As a practical matter, however, this difference in approach has proved to be of little significance: there apparently has never been a case in which a court of appeals has excluded a co-conspirator's statement under the Confrontation Clause after finding that the statement satisfied Rule 801(d)(2)(E). For that reason, the conflict among the circuits on this issue is not one that warrants this Court's attention. In any event, the Second Circuit is one of the courts that requires an independent reliability review under the Confrontation Clause. Petitioners had the benefit of the more generous standard in this case, so review by this Court is particularly inappropriate here.

b. Under the reliability analysis urged by petitioners—and applied by the court of appeals in this case—it is clear that the co-conspirator statements in this case were correctly admitted at trial. First, almost all the statements related to contemporaneous events. There was therefore no risk of inaccuracy stemming from faulty recollection on the part of the declarants. See *United States* v. *McGrath*, 613 F.2d 361, 368 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980); *United States* v. *Wright*, 588 F.2d 31, 37-39 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979).

Second, the statements were virtually all against the penal interest of the declarants. Again, this factor decreased the likelihood that the statements would be false or mistaken. See *United States* v. *Pagan*,

721 F.2d 24, 31 (2d Cir. 1983); *United States* v. *Perez*, 702 F.2d 33, 37 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Perez*, 658 F.2d 654, 662 (9th Cir. 1981).

Third, contrary to Paone's assertion (85-1892 Pet. 14), the declarants in this case had no apparent motive to dissemble; most of the statements were made among the co-conspirators at a time when they knew each other to be members of the conspiracy. See *United States* v. *Mallah*, 503 F.2d 971, 980 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975). Moreover, most of the statements were made while the declarants were reacting to, planning, or carrying out significant events in the operation of the enterprise. It was therefore most unlikely that the co-conspirators would have intentionally misreported those important events to their associates. See *United States* v. *DeLuna*, 763 F.2d at 910 & n.3; *United States* v. *Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir.), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Ammar*, 714 F.2d 256-257 & n.16; *United States* v. *Wright*, 588 F.2d at 37-38.[16]

Finally, the co-conspirators' declarations in this case were well corroborated by the testimony of the principal government witnesses and by other evidence.

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[16] In attacking the reliability of the co-conspirator declarations, Paone (85-1892 Pet. 4-8, 17-18) has erroneously focused on the motivations of the witnesses at trial to lie in recounting those declarations. The probity or lack of probity of the witnesses who reported the declarations, however, has little to do with the admissibility of the declarations themselves under the Confrontation Clause, since the trial witnesses were available to be cross-examined on the accuracy of their reports. It is the *declarants'* motivations that are important; and in this case there is no basis to believe that the declarants had any motivation to dissemble at the time they made the statements.

See *United States* v. *DeLuna*, 763 F.2d at 910-911; *United States* v. *Ammar*, 714 F.2d at 256-257; *United States* v. *Wright*, 588 F.2d at 38. The bulk of the government's case was based on the first-hand observations of witnesses Oliveri, Monachino, Pelusio, Rallo, and gambling club operator Thomas DiGiulio. Their testimony was extensively corroborated with respect to particular events by physical evidence and by police surveillance evidence.[17] In sum, because the court of appeals applied the same reliability test that is urged by petitioners, and because, after applying that test to the lengthy and complex factual record in this case, the court of appeals found the statements to be admissible, this issue does not warrant further review.

4. Petitioner Marotta contends (85-1883 Pet. 16-18) that he was denied his right to conflict-free counsel when the district court refused to grant him a severance or a continuance so that he could discharge

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[17] To the extent that Confrontation Clause analysis must also include consideration whether the statements are "crucial" to the prosecution or "devastating" to the defense (see *Dutton* v. *Evans*, 400 U.S. 74 (1970)), as petitioners also suggest (85-1892 Pet. 18-21; 85-1949 Pet. 17-18), the statements in this case were neither. The co-conspirator declarations did fill in certain details about which the government witnesses did not have first-hand knowledge. But because of the substantial additional evidence inculpating the defendants, and the extensive corroboration of the testimony of the principal witnesses, the co-conspirator declarations played a relatively limited independent role in inculpating the defendants. See *United States* v. *Perez*, 658 F.2d at 662. The court of appeals was therefore correct in concluding that this was not a case calling for the application of the Second Circuit rule that imposes a higher standard of reliability when the hearsay statements are "crucial" to the government's case (Pet. App. A7, quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)).

his attorney and substitute new counsel during the trial. Building on this claim, petitioners Marino and Rossi assert (85-1949 Pet. 11-13) that the other defendants were prejudiced by the continued involvement of Marotta's lawyer in the case. These arguments are meritless.

a. During his cross-examination, government witness Angelo Monachino disclosed that when he was arrested in 1975 on unrelated charges, attorney Richard Miller, who represented Marotta in this trial, had sought to obtain bail for him. At a bench conference, Miller explained that he had shared an office with Monachino's lawyer at that time, and that on several occasions between February and June 1975 he had assisted Monachino's lawyer in representing Monachino on the pending charges, all of which were unrelated to the charges involved in this case. Miller added that he had not represented Monachino on any matter since 1975 (Tr. 1000-1002).

At that point, Marotta requested that Miller be discharged as his attorney, and he asked for permission to retain new counsel (Tr. 1018). The court then held a lengthy colloquy with Monachino, in which Monachino agreed to waive his attorney-client privilege with regard to any disclosures he may have made to Miller in the course of that representation (Tr. 1038-1052; see also Tr. 1112-1113). Following that colloquy, the district court declined to grant Miller leave to withdraw from the case.

The court of appeals correctly held that the district court's action did not abridge Marotta's Sixth Amendment rights. First, the court noted that a criminal defendant does not have an unfettered right to substitute new counsel, particularly after trial has commenced, when such a step will require a severance, a

delay in the trial, or some other disruption in the proceeding. See *United States ex rel. Spurlark* v. *Wolff*, 683 F.2d 216, 219-220 (7th Cir. 1982); *McKee* v. *Harris*, 649 F.2d 927, 931 (2d Cir. 1981), cert. denied, 456 U.S. 917 (1982); *United States* v. *Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973). Certain restraints must be placed on the reassignment of counsel lest the right be " 'manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.' " *McKee* v. *Harris*, 649 F.2d at 931 (quoting *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), cert. denied, 375 U.S. 940 (1963)). In this case, to have permitted Marotta to change counsel would have required either a lengthy postponement in the trial or, more likely, a severance and a separate trial for Marotta alone. In these circumstances, it was perfectly proper for the court to deny the request for substitution of counsel.

Moreover, as the court of appeals correctly held, Miller's purported conflict of interest was highly attenuated. Miller's representation of Monachino had occurred ten years earlier, it was extremely limited in nature, and it was unrelated to any of the present charges. In addition, Monachino expressly waived any attorney-client privilege he had, which authorized Miller to use, on Marotta's behalf, any information he may have secured during the prior representation. Under these circumstances, Marotta could not have been prejudiced by Miller's prior representation of Monachino. See *United States* v. *Agosto*, 675 F.2d 965, 972 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *United States* v. *Shepard*, 675 F.2d 977, 980 (8th Cir. 1982); *Theodore* v. *New Hampshire*, 614 F.2d 817 (1st Cir. 1980); *United States* v. *Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied,

446 U.S. 964 (1980); *United States* v. *Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); see generally *United States* v. *Cunningham*, 672 F.2d 1064, 1072 (2d Cir. 1982) ("we are aware of [no case] in which an attorney has been disqualified on grounds of conflicting prior representation solely at the behest of a person other than the former client or its privy"), cert. denied, 466 U.S. 951 (1984). Finally, the district court carefully informed the jury of the insubstantial nature of the prior representation and advised the jurors that they were to draw no adverse inferences from that representation (Pet. App. A10; Tr. 1114-1116). The court of appeals correctly concluded that in view of the detailed instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any showing of prejudice to Marotta,[18] no substitution of counsel was necessary.[19]

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[18] Marotta complains (85-1883 Pet. 12-15) that as a result of his inability to obtain substitute counsel, he was unfairly bound by the stipulations entered into by other counsel, to which he did not agree. That is incorrect. In fact, Marotta signed certain of the stipulations and declined to sign others. The court repeatedly acknowledged that Marotta would not be bound by the stipulations that he did not sign, and it so instructed the jury (Tr. 5332, 5596, 6509-6512, 6530-6535).

[19] Petitioner's claim (85-1883 Pet. 16) of a conflict among the circuits on this issue is insubstantial. Petitioner relies on *Walberg* v. *Israel*, 766 F.2d 1071 (7th Cir. 1985), cert. denied, No. 85-331 (Dec. 12, 1985) and *Wilson* v. *Mintzes*, 733 F.2d 424 (6th Cir.), vacated, 469 U.S. 926 (1984), on remand, 761 F.2d 275 (6th Cir. 1985), in which the courts ruled that substitution of counsel should have been allowed. Those cases, however, are readily distinguishable. In *Walberg* the court of appeals granted relief because it concluded that the trial court's hostility to defense counsel had denied the defendant a fair trial. In *Wilson*, the court of appeals likewise concluded that the trial judge's antagonism toward defense

b. Petitioners Marino and Rossi argue (85-1949 Pet. 11-13) that the remaining defendants were prejudiced by Miller's continued representation of Marotta at trial. They reason that Miller's previous representation of Monachino, coupled with his ongoing representation of Marotta, bolstered in the minds of the jurors the government's theory "that an organization/enterprise existed * * * and that one of its objectives was to subvert law enforcement efforts by supplying legal assistance to its alleged members" (85-1949 Pet. 12). This is a most speculative inference to draw; certainly nothing in the one line of testimony about Miller's prior representation of Monachino suggested that Miller had been hired to represent Monachino by the "enterprise"—much less that Miller was subsequently reassigned to Marotta in some sort of "mob legal services" arrangement (*ibid.*). Indeed, in the setting in which the Miller episode arose, it is particularly unlikely that the jury drew any parallel between that episode and the two instances in which members of the enterprise had obtained legal assistance for others. The testimony about those two instances came much later in the trial and involved defendants other than Marotta. Moreover, the court's curative instruction put to rest any possible adverse inference the jury might have drawn from the Miller episode; the court carefully explained to the jury that Miller was simply accommodating an attorney with whom he shared office space when he represented Monachino, that he performed a relatively minor service, and that such an accommodation is not at all uncommon among criminal defense lawyers (Tr. 1114-1115).

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counsel, which included suggestions that counsel was incompetent, resulted in real prejudice to the presentation of a defense.

5. Petitioner Marino claims (85-1949 Pet. 14-15) that he was denied a fair trial when the court did not permit him to call Marotta's lawyer as a defense witness. The court of appeals correctly found that this argument was without merit (Pet. App. A16).

One morning late in the trial, counsel for Marino announced to the court that he had just learned from Marotta's attorney, Richard Miller, that Miller had been present at a gathering at Marino's home on the day of Gingello's funeral (Tr. 4052). Marino's counsel said that Miller would testify that the event was a quiet and entirely innocuous after-funeral affair, and not a meeting to plan revenge against the rival faction for the murder of Gingello. The trial court noted that if counsel wished to establish that point, Miller was not an essential witness, because there were many other persons present at that gathering who could testify on the point (Tr. 4053).[20] After a formal proffer was made at the close of the defense case, the district court ruled that because Miller was an attorney for a party in the case, it would be improper for him to appear as a defense witness (Tr. 6876).

It is well settled that a district court should not permit an attorney for a party to testify as a witness absent compelling reasons or extraordinary circumstances. See *United States* v. *Dack*, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); *United States* v. *Johnston*,

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[20] Contrary to petitioner's contention, there was no suggestion by the government at trial that the post-funeral gathering at Marino's house was anything but an innocuous post-funeral affair, as Miller would have testified. The government's evidence was that the critical meeting among the co-conspirators, at which they planned the campaign of revenge against Didio's faction, occurred at Rossi's apartment several days later (see Tr. 2766-2770, 3488, 3519-3523, 3552-3553).

690 F.2d 638, 644 (7th Cir. 1982); *United States* v. *Bates*, 600 F.2d 505, 510-511 (5th Cir. 1979); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977); *United States* v. *Torres*, 503 F.2d 1120, 1126 (2d Cir. 1974). Only if the proposed testimony is important, and there is no other way to present that evidence, is it appropriate to permit a participating lawyer to testify. *United States* v. *Bates*, *supra*; *United States* v. *Nyman*, 649 F.2d 208, 211 (4th Cir. 1980). Here, the court of appeals, with the entire record before it, concluded that the minimal value of Miller's prospective testimony did not warrant departing from the traditional proscription against testimony by a party's attorney. That decision was plainly correct: the post-funeral gathering at Marino's home was apparently a well-attended affair, and there were presumably other persons who could have testified about the nature of the affair, to the extent that that evidence was relevant at all.

6. Petitioners Russotti, Piccarreto, Marino, and Rossi contend (85-1901 Pet. 6-9; 85-1902 Pet. 16-19; 85-1949 Pet. 8-10) that the district court erred when it failed to admit the recorded testimony of two of the defendants from prior state proceedings. The defendants had offered testimony given by Colombo before a state grand jury and testimony given by Piccarreto in a state criminal trial. They argued that, although the prior testimony was hearsay as to the two declarants, it was admissible on behalf of the other defendants, under Fed. R. Evid. 804(b)(1), as the former testimony of an unavailable declarant. The district court refused to admit the prior testimony because the United States had not been a party to the state proceedings, and thus, as "the party against whom the testimony is now offered," the

United States did not have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). See *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, No. 84-971 (Apr. 15, 1985); *United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.), cert. denied, 457 U.S. 1134 (1982); *United States* v. *Atkins*, 618 F.2d 366, 372-373 (5th Cir. 1980); see also D. Louisell & C. Mueller, *Federal Evidence* § 487, at 1102 n.3 (1980).

Recognizing that Rule 804(b)(1) does not allow the admission of this proffered evidence, petitioners maintain that the rule is unconstitutional as applied. In making this argument, petitioners rely principally on this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). *Chambers*, however, is readily distinguishable from this case. In *Chambers*, the defendant was prevented by state hearsay rules from introducing several statements made by a person who confessed to the very crime for which the defendant was on trial. The statements were thus directly exculpatory of the defendant, amounting to evidence "critical to Chambers' defense" (410 U.S. at 302). Moreover, the statements had considerable assurances of reliability: they were corroborated by other evidence; they were quite clearly against the penal interest of the declarant; and the declarant was in fact available for cross-examination (410 U.S. at 300-301).

Here, by contrast, the proffered testimony consisted of little more than bare self-serving denials of culpability by Piccarreto and Colombo (see Piccarreto App. 507-528, 6263-6264).[21] Piccarreto simply denied having been personally involved in the Massaro mur-

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[21] "Piccarreto App." refers to the appendix to Piccarreto's brief in the court of appeals.

der plot; his testimony did nothing to exculpate the other defendants. Similarly, in his state grand jury testimony, Colombo simply denied that he and Oliveri had attempted to murder DiMarco. Thus, Colombo's testimony exculpated Colombo—who clearly was precluded from offering his own prior testimony—but it did nothing to exculpate the remaining defendants. Finally, in the prior state proceedings, both defendants were testifying under circumstances giving them a powerful motivation to lie.

Thus, the proffered testimony in this case was not critical to the defense, nor did it possess any of the assurances of reliability that characterized the evidence in *Chambers*. This would therefore be a highly unsuitable case in which to consider, as petitioners urge, whether to fashion a novel constitutional exception to Rule 804(b)(1).

7. Finally, petitioners Marino and Rossi contend (85-1949 Pet. 25-27) that the court of appeals erred in permitting consecutive sentences for their convictions under the RICO substantive and conspiracy provisions, 18 U.S.C. 1962(c) and (d). That contention flies in the face of this Court's analysis of closely analogous statutory schemes as well as the rule adopted in the great majority of circuits.

This Court has long held that it is permissible to impose consecutive sentences for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States*, 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit cumulative punishment. In *Albernaz* v. *United States*, 450 U.S. 333

(1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).

Applying the same analysis, the courts of appeals that have considered the issue have noted that RICO substantive and conspiracy provisions require proof of separate elements; they have therefore almost uniformly concluded that the two provisions permit consecutive punishments. *United States* v. *Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985); *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Marrone*, 746 F.2d 957, 959 (3d Cir. 1984); *United States* v. *Cagnina*, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Rone*, 598 F.2d 564, 570-571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). The only exception is the Sixth Circuit's decision in *United States* v. *Sutton*, 642 F.2d 1001, 1040 (en banc), cert. denied, 453 U.S. 912 (1981). In *Sutton*, the court held that because the same evidence at trial supported both the

RICO substantive and conspiracy convictions, the convictions merged for purposes of sentencing. As later cases have pointed out, however, the *Sutton* court overlooked the fact that the *Blockburger* test focuses not on the evidence adduced at trial, but on the elements of the crimes charged. *United States* v. *Davis*, No. 85-2473 (10th Cir. June 9, 1986), slip op. 6-8; *United States* v. *Watchmaker*, 761 F.2d at 1477; *United States* v. *Marrone*, 746 F.2d at 959. As long as the elements of the two crimes are different, there is no constitutional impediment to imposing cumulative punishments for conduct that violates both statutory provisions—even if the same proof at trial supported both convictions.

Although there is a conflict among the circuits on this issue, it is not one that requires resolution by this Court. The *Sutton* case was decided before this Court's decision in *Albernaz* and before most of the circuit court decisions that have rejected *Sutton*'s analysis of the consecutive sentencing issue. In light of these subsequent developments we believe that when the Sixth Circuit once again squarely confronts the issue, it is highly likely that that court will conclude that consecutive sentences are permissible under 18 U.S.C. 1962(c) and (d).[22]

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[22] In *United States* v. *Qaoud*, 777 F.2d 1105, 1118 (1985), the Sixth Circuit referred to its previous decision in *Sutton*, but it did not have occasion to revisit the merits of the consecutive sentencing issue.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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